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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1469

TIME, INC.,

Petitioner,

v.

JACK WASSERMAN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals rendered on March 3, 1970, is unreported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1970. The petition for a writ of certiorari was filed on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition herein seeking to review an interlocutory order (denial of summary judgment) is premature and inappropriate for review on certiorari.

2. Whether publication by petitioner of untrue and knowingly false statements that respondent, an attorney at law, attended a meeting bigger than Apalachin, that he was a Top Cosa Nostra hoodlum, that he had been arrested, released on $100,000.00 bail, and refused to testify before a Grand Jury, is protected by the constitutional provisions of the First Amendment. Can this be defended under the First Amendment upon the basis of editorial judgment?

3. Whether on the record presented herein issues of fact were raised requiring the denial of summary judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

STATEMENT OF THE CASE

A. THE PLEADINGS

The complaint sets forth an action for libel based on the publication by petitioner in its October 7, 1966, edition of Time Magazine of an article and photograph (App. 2) pertaining to respondent, a member of the Bar of this Court. It is alleged that the article and photograph accuse

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respondent of being a "top Cosa Nostra hoodlum" who had attended a meeting in Queens, New York, "bigger than Apalachin", that he was arrested, released on bail of $100,000.00, and that he refused to testify before a Grand Jury in Queens (Par. 5-6 of Complaint, App. 2-3). By letters dated October 6, 1966, and October 17, 1966, respondent called petitioner's attention to the original Daily News photograph republished by Time, Inc., in connection with the October 7, 1966, article and to the fact that the byline on such original photograph had a caption describing respondent and another, Frank Ragano, as attorneys for the others who were accused of Cosa Nostra affiliations and who had been arrested. A retraction was requested and refused. The allegations in Time Magazine are alleged to be false and defamatory and published maliciously (Par. 7, 8, 9 and 10 of Complaint, App. 3).

The answer admits publication of the article and photograph, and the receipt of letters from respondent. It is alleged that the article is true (Third Defense, App. 6), that it was published without malice and reasonably believed to be true, that it was a fair comment, that respondent assumed the risk of identification with the group with whom he had luncheon, that respondent secured improper publicity for himself, that by representing clients in matters of public interest he became a public figure, that the article was privileged, published in good faith in reliance on responsible sources which petitioner believed, and that it was protected by the First Amendment (Fourth-Tenth Defenses, App. 6-7).

B. BACKGROUND OF CASE

On September 22, 1966, thirteen individuals of Italian origin met for luncheon in a small restaurant known as La Stella in Queens, New York. This prompted their arrest as material witnesses, the setting of bail in the sum of $100,000.00 for each at 2:00 a.m. on the following morning, and their appearance for Grand Jury testimony on a

dozen or more occasions (Def. Ex. 45-50; 97-126).[1] The District Attorney for Queens was a candidate for reelection and the occurrences noted herein and each Grand Jury appearance of the thirteen "material witnesses" produced extensive press coverage (Def. Ex. 45-50; 97-126; 131-138). The American Civil Liberties Union charged that these episodes were "a familiar burlesque performance" conducted as "a sort of running press conference" and "staged when one of the principals is running for election" (Def. Ex. 48).

Respondent, a member of the Bar of the State of New York and the District of Columbia, formally appeared as attorney for four of the so-called material witnesses, Carlos Marcello, Joseph Marcello, Frank Gagliano and Anthony Carollo. Initially, these witnesses claimed the Fifth Amendment and other constitutional safeguards before the Queens County Grand Jury. After the grant of immunity they testified and were released.

During a noon recess on the occasion of one of the Grand Jury appearances on September 30, 1966, respondent, his four clients, another "material witness", Santo Trafficante, and his attorney, Frank Ragano, had lunch at La Stella Restaurant. Members of the press followed them and photographed them as they ate. The following day a front page New York Daily News photograph, caption and story described the event as the return to La Stella Restaurant of five Cosa Nostra men, together with their two attorneys, respondent "Jack Wasserman of Washington, attorney for the Marcellos and Frank Ragano, Trafficante's lawyer". (Def. Ex. 132). The New York Post stated that five mobsters went back for dessert (Def. Ex. 131). The New York Times stated that five of the Mafia witnesses and their attorneys ate lunch at the restaurant where they were seized (Def. Ex. 133). Newsday reported that accused members of the Cosa Nostra (identifying each one) and their

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[1] References are to Defendant's Exhibits for Identification, Wasserman Deposition.

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lawyers, Jack Wasserman and Frank Ragano, lunched together in Forest Hills (Def. Ex. 135). In its October 7, 1966, issue of Time, the following week petitioner, utilizing the Daily News photograph, described the five clients, as well as their attorneys, as the Cosa Nostra hoodlums who were arrested, released on bond and who claimed the Fifth Amendment (App. 5). A request for a retraction was refused (App. 10-13). After instituting this lawsuit, the same photograph with respondent's picture was republished with the statement that it showed mobster, Carlos Marcello, and his friends (Def. Ex. 31, p. 34).

C. DEPOSITION TESTIMONY

Depositions were taken on January 17, 1967, of the researcher, writer, editor and counsel of petitioner.[2] Serena Rachels, researcher, Timothy James, writer, and George Daniels, editor, testified that they based the publication herein primarily on newspaper accounts of the event contained in the New York Times, New York Post and New York Daily News (App. 55, 64, 69, 74-75, 89, 114).[3] These newspaper accounts described respondent as the attorney for the Marcellos (Daily News, October 1, 1966), and as one of the two lawyers for the Mafia witnesses (New York Times, October 1, 1966). (Def. Ex. 131, 132, 133.)

A Daily News photograph appearing on the front page of the newspaper on October 1, 1966, described respondent as one of the attorneys for "Cosa Nostra mobsters" (Def. Ex. 132), Newsday referred to those in the photograph as alleged members of the Cosa Nostra gangs and their lawyers, Jack Wasserman and Frank Ragano (Def. Ex. 135). The Daily News photograph used in Time Magazine had the following caption:

[2]The publication was also reviewed by two top editors, Jim Keogh and Otto Fuerbringer (App. 58-59).

[3]Serena Rachels testified that she also consulted biographical files of those involved (App. 53-54).

"Clams all around. Presumably picking up where their festa was interrupted by arrest September 22, Cosa Nostra mobsters and attorneys gather at La Stella Restaurant, Forest Hills, Queens, during lunch break from Queens Criminal Court. * * * Left to right starting with man with glasses: Jack Wasserman of Washington, attorney for Marcello brothers; Carlos Marcello, Santo Trafficante of Tampa, Florida, and one-time gambling chief in pre-Castro Cuba. Attorney Frank Ragano, lawyer for Trafficante; Anthony Carollo of New Orleans, Louisiana (reputed lieutenant for Marcello brothers) Frank Gagliano of New Orleans, Louisiana (teputed lieutenant for Marcello brothers) and Joseph Marcello of New Orleans, Louisiana (back to camera). Cr. Paul De Maria, New York Daily News." (Editorial Reference file submitted by petitioner Tab 2).

Rachels, James and Daniels were aware prior to the publication that respondent and Frank Ragano were attorneys for those in the photograph (App. 66-67, 92-93, 99, 120-121). They also knew that respondent did not consent to identification of himself as a Cosa Nostra member (App. 102) and that he did not seek publicity in connection with the luncheon (App. 103). According to Rachels, respondent was not identified as an attorney because no one was identified (App. 80-82). However, she maintained that the article did not say that every person in the photograph was a Cosa Nostra hoodlum (App. 73). She believed only that some but not all were in fact members of Cosa Nostra (App. 75). James asserted that it did not seem apropos at all "to identify respondent as an attorney" (App. 99). Journalistically speaking, Daniels considered the entire group in the photograph Cosa Nostra hoodlums and intended to convey that everyone therein was a top Cosa Nostra hoodlum. For this reason respondent was not identified as an attorney (App. 121-128).

The employees of petitioner were aware that Cosa Nostra was the "underworld family" or the Mafia, a criminal organization (App. 70, 97, 101, 126), and that the Apalachin

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meeting was a great meeting of underworld figures (App. 69, 96, 126, 159-160). They asserted that the publication herein fully and accurately told the true facts (App. 75, 95, 125). John F. Dowd, counsel for Time, Inc., testified that after consultation with him the managing editor decided that no retraction would be made (App. 154).

On September 1 and 8, 1967, after the institution of this litigation, petitioner[4] began a series of articles on the "Mob", the "Brazen Empire of Organized Crime" (Def. Ex. 29 and 30). Carlos Marcello was described as "King Thug of Louisiana" (Def. Ex. 30, pp. 94-95). On September 29, 1967, the photograph of the September 30, 1966, luncheon which showed respondent as a diner, was republished in Life with the notation that Marcello and Trafficante, Cosa Nostra bosses, "returned to the restaurant with some friends for the meal shown here" (Def. Ex. 31, p. 34).

Deposition testimony was taken of respondent on December 5, 1967, and April 23, 1968, aimed, according to petitioner's counsel, at establishing that respondent was "house counsel to organized crime".[5] This deposition (App. 179-273) was devoted to the identification of a quantity of newspaper clippings relating to Carlos Marcello (Def. Ex. 1-23), Santo Trafficante (Def. Ex. 25-44) and others (Def. Ex. 32-49). The respondent testified that he had represented criminal defendants in approximately a dozen cases in the past five years (Tr. April 28, 1968, pp. 116-136), and that he was counsel for Carlos Marcello in deportation, criminal and tax matters (App. 183-184, Tr. April 23, 1968, pp. 102-115). He testified that he had appeared as attor-

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[4]Time, Inc., the petitioner, publishes Time Magazine as well as Life.

[5]On March 22, 1968, Mr. Medina, counsel for petitioner, advised District Judge Hart as follows:

> "Your Honor, I think I am entitled to show that this man (respondent) has become so that he is exclusively representing * * * he has become house counsel to organized crime. He is dependent for his livelihood upon organized crime." (Tr. March 22, 1968, p.25.)

ney for four of the individuals in the photograph involved herein (App. 240). The circumstances relating to the September 30, 1966, luncheon were the subject of testimony (App. 263-270). No evidence was developed to show any basis for the charge that respondent was house counsel for organized crime or that he was dependent for his livelihood upon organized crime.

D. MOTIONS FOR SUMMARY JUDGMENT

In their motion for summary judgment, petitioner stressed that its publication was based upon "various published reports of the La Stella luncheon" (App. 17) and that its researcher, writer, and editor "all testified to their belief in the truth of the article at the time it was published (App. 18). Upon this basis it was asserted that petitioner had First Amendment protection and immunity. Petitioner asserted that respondent was a Cosa Nostra hoodlum, that he "played the part of a Cosa Nostra leader by participating in a staged luncheon" on September 30, 1966, that he consented to the article, that it was true, that respondent could not establish malice, and that summary judgment was required to protect Time's constitutional rights. However, petitioner admitted the falsity of the charge that respondent attended the first La Stella luncheon on September 22, 1966, bigger than Apalachin, that he was arrested in connection with that luncheon, that he was released on bail of $100,000.00, and that he refused to testify before a Grand Jury, and that these facts were known to its staff at the time the article was written (App. 23, 24, 43).[6]

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[6]Under Rule 9(h) of the District of Columbia Rules of Practice, a statement of material facts as to which a party contends there is no genuine issue must accompany a motion for summary judgment and such facts, if not controverted in good faith, are admitted. Petitioner did not controvert respondent's statement of material facts in regard to the falsity of these statements and knowledge of their falsity.

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Respondent, by affidavit, categorically denied membership or affiliation in Cosa Nostra or any other criminal fraternity. He likewise denied that he consented to the article, that he ever consented to identification as a Cosa Nostra member, or that he invited the press to lunch or solicited any photographs (App. 28-29). Respondent contended that petitioner's article designated all in the photographs as Cosa Nostra hoodlums and accused all of criminal activities. The refusal to retract and the republication of the photograph in the same context after this litigation was noted as indicative of malice (App. 25-26). The reckless disregard of the truth herein was urged as a basis for the grant of interlocutory summary judgment for respondent.

E. THE DECISIONS BELOW

The District Court granted petitioner's motion for summary judgment without opinion and without reference to the contrary ruling in a companion case, *Ragano v. Time, Inc.*, 302 F. Supp. 1005 (M. D. Fla., 1969). The Court of Appeals reversed, remanding for trial "on the issues of actual malice, defamation and possible damages". The Court of Appeals ruled:

> " * * * it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail. Time's position is that by attending the delayed lunch meeting the attorneys were playing a part and were engaging in a demonstration defiant of the law, which justified Time in its editorial decision reached in good faith[7] not to refer to appellant and Ragano as attorneys, but to place them in the same category as the others

[7]It is obvious that the Court made no finding of good faith as contended by petitioner (Brief of Petitioner, p. 19), but merely stated Time's position that its editorial decision was reached in good faith.

characterized in the article as we have set forth. Such a decision on the part of the editors of Time, however, would not preclude responsibility for any defamation known to be false or made with reckless disregard of the truth."

ARGUMENT

1. At this stage of the case an application for certiorari to review the denial of summary judgment and the remand order of the Court of Appeals is premature. Except in extraordinary situations a writ of certiorari is not issued until final decree. *American Construction Co. v. Jacksonville, T & K R Co.*, 148 U.S. 372, 384 (1892); *Hamilton-Brown Shoe Co. v. United States*, 240 U.S. 251, 257-8 (1916); *Brotherhood of Locomotive Firemen & Engineers, et al. v. Bangor & Aroostock R R Co., et al.*, 389 U.S. 327, 328 (1967). Extraordinary circumstances are not presented here to sanction review in advance of trial and full development of the facts. When *Time, Inc. v. Pape* No. 1309, Oct. Term, 1969, cert. granted April 27, 1970) presented a similar record, certiorari was denied to review a reversal of summary judgment granted to Time, 354 F.2d 558 (7th Cir., 1965, cert. denied 384 U.S. 909). Libel cases have repeatedly required final judgments before the grant of certiorari. *St. Amant V. Thompson*, 390 U.S. 727 (1968); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Henry v. Collins*, 380 U.S. 356 (1965); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892 (3rd Cir., 1969), cert. granted Feb. 24, 1970 (No. 947, Oct. 1969 Term).

2. The decision below reversing the grant of summary judgment conforms to *Poller v. Columbia Broadcasting*, 368 U.S. 464 (1962); *United States v. Diebold*, 369 U.S. 654 (1962); and *Walker v. Courier-Journal*, 368 F.2d 189 (6th Cir., 1966). In a companion case herein, *Ragano v. Time,*

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Inc., 302 F.Supp. 10005 (M. D. Fla., 1969), motions for summary judgment have been denied.

As these cases decide, trial by affidavits or depositions without full examination and cross examination of witnesses under judicial supervision, are no substitute for trials by jury. Resolution of issues of petitioner's good faith in publishing the article herein and whether there was malice were fact questions placed in dispute to be resolved by a jury.

Respondent submits that absence of good faith and malice is resolved against petitioner by reason of the falsity of the publication and knowledge of such falsity. At any rate, petitioner's interpretation of the facts as to the reason why the Time employees wrote the article as they did is in dispute. Petitioner argues that the employees had an honest belief that "seven persons, including Wasserman, who participated in the second La Stella luncheon were showing their contempt for law enforcement authority by acting the part of the 13 hoodlums who had been arrested at the first La Stella luncheon" (Brief of Petitioner, p. 17). However, the writer, James, knew of no facts which would justify an opinion that respondent was contemptuous of the public or judicial process, as a result of the luncheon of September 30, 1966, at La Stella (App. 104), and Dowd had no information to contradict respondent's stated reason that he went to La Stella to inspect the premises and eat lunch (App. 153, 154).

The Court of Appeals judgment remanding the case for trial correctly applied decisions of this Court. It was consistent with the views of other circuits.

3. As the Court below recognized, the instant case is a clear and simple application of *New York Times v. Sullivan*, 376 U.S. 254 (1964). False statements deliberately made are made with malice and have no constitutional protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1966); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Walker v. Courier-Journal*, 368

F.2d 189 (6th Cir., 1966); *Anti-Defamation League of Bnai Brith v. F.C.C.*, 403 F.2d 169 (D.C. Cir., 1968); *Goldwater v. Ginsburg*, 414 F.2d 324 (2nd Cir., 1969), cert. denied January 26, 1970 (No. 687, October 1969 Term).

Petitioner has sought to distinguish the instant case by categorizing it as a "deliberate omission" libel case and by assuming that the decision below rests upon the mere failure of petitioner to refer to respondent as an attorney.[8]

The failure to refer to respondent as the attorney for those in the picture resulted in the characterization of respondent in the same manner as all others in the picture. This fact is not only self-evident but was recognized by petitioner. Mr. Daniel, the editor, considered respondent as a "member of the group" and recognized that the article stated that the group were "top Cosa Nostra hoodlums" (App. 122, 124). The effect of characterizing respondent in the same manner as all others in the picture and petitioner's knowledge of the falsity of such characterization is established by the record as follows:

(a) Respondent was charged with Cosa Nostra membership, i.e. active participation "in organized crime, including interests in extortion, narcotics, prostitution, loan sharking, and every conceivable form of gambling * * * hijacking, bootlegging and murder for hire." (Item 10, Respondent's Statement of Material Facts, App. 23, not denied by petitioner. Def. Ex. 29, p. 20).

This vicious charge was and is false (Affidavit of Respondent, App. 27-30). It was known by petitioner to be false. Petitioner filed no affidavit under Rule 56(e) of the Rules of Civil Procedure to set forth any basis for the alleged truth of the charge that respondent was a member of the Cosa Nostra or for any belief in the truth of such charge. More-

[8]The case herein is distinguishable from *Time, Inc. v. Pape* (no. 1309, October Term, 1969, cert. granted April 27, 1960). In the *Pape* case there was a failure to fully describe the source of a charge of brutality. Here, there was a complete falsification of several serious charges.

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over, the source of the Time article was primarily the news accounts of the luncheon at the La Stella on September 22, and 30, 1966 (Def. Ex. 131, 132, 133, 135). None of these news accounts accused respondent of Cosa Nostra membership or any of the other charges in the article.

Falsely calling an attorney a member of the Mafia is libellous *per se*, *Santoro v. Fischback*, N. Y. Law Journal, March 31, 1968. See also: *Jaworsky v. Padfield*, 211 So. Rep. 2d 152 (La., 1968).

(b) Respondent was charged with attending a meeting "bigger than Apalachin". The Apalachin meeting is recognized among the public as a meeting of top organized criminals and was so recognized by petitioner (App. 69, 96, 126). Petitioner has admitted this statement was false and known to be false by petitioner (Items 11 and 12, Respondent's Statement of Material Facts, App. 23, 24, admitted by petitioner, App. 43). Malice is, therefore, apparent under the *New York Times* standards.

(c) Respondent was charged with an arrest. Petitioner has admitted this statement was false and known to be false by petitioner (App. 23, 24, 43). This allegation is defamatory, *Washington Post Co. v. Kelly*, 38 F.2d 151 (D.C. Cir., 1930), particularly when coupled with the allegations that he had been released upon $100,000.00 bail, which connotes an arrest for a major crime, and the false allegation that he had refused to testify before a Grand Jury.

Petitioner was fully aware as a result of its research, that the foregoing statements, hardly omissions as petitioner asserts, had reference to respondent's clients and not to him, their attorney. Its admission of falsity and knowledge of falsity defeats any defense of truth or lack of malice.

Moreover, petitioner's insistence that the entire article is truthful in the face of the facts, its refusal to retract and its republication after litigation of the photograph (Def. Ex. 31, p. 34) describing respondent as a friend of alleged Cosa Nostra boss, Carlos Marcello, all point to the fact that this was not a case of inadvertence but of deliberate and mali-

ciously false publication. *Domchick v. Greenbelt Consumers Services*, 200 Md. 36, 46-48, 87 A.2d 831 (1952); *Phelps & Hamilton, Libel* (1966); pp. 17, 261; *Prosser, Torts*, 3rd Ed. (1964), pp. 826-7; *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196, 204 (9th Cir., 1937).

4. Petitioner lays stress on the value of freedom of the press. However, the Supreme Court has consistently emphasized that this right does not permit the publication of defamations that are known to be false or in reckless disregard of the truth. The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed a cherished activity, does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the interests of others. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). None of the cases relied on by petitioner are cases in which a defamatory statement was made that was knowingly false or with reckless disregard of the truth.

The argument by petitioner that suits such as this would have a chilling effect on the press discussion of organized crime is absurd. The battle against crime does not require the reckless labelling of attorneys for defendants as "top Cosa Nostra hoodlums". On the contrary, such labelling with impunity would have a "chilling effect" on the obligation of attorneys to represent unpopular persons and the right of such persons to counsel.

CONCLUSION

The decision below is not ripe for review by this Court. It presents no conflict of circuits and conforms to the decisions of this Court. The petition should be denied.

Respectfully submitted,

CHESTER C. SHORE
Warner Building
Washington, D. C.

Attorney for Respondent

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